IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.3026 OF 2004

Harichandra Eknath Phapale Applicant
versus
Lahanu Shankar Takalkar & anr. Respondents

Ujjwal S. Patil for applicant.
Rajesh More for respondent no.1.
Mrs.M.M.Deshmukh, APP for State.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 13th September 2006

PC :

1. This criminal application under section 482 of Code of Criminal Procedure is challenging an order passed by the Revisional Court refusing to interfere with an order of the learned Magistrate issuing process and summoning the applicant to answer the averments in an complaint arising out of dishonoured cheque. The offences alleged are punishable under Negotiable Instruments Act, 1881.

2. The only submission which is canvassed before me is that the orders suffer from error apparent

on the face of record. The submission is that before a complaint could be filed alleging that offences under the aforesaid act have been committed, it is necessary that the complainant issues a notice as contemplated by Section 138(1)(b). Such a notice has to be given in writing to the drawer of the cheque. In this case, the drawer of the cheque has not received any such notice. The notice which is purportedly dispatched, has been on the own showing of the complainant returned with the postal remark that the addressee has shifted to some other place. If the postal acknowledgement is of such nature, then it cannot be said that the provisions pertaining to the demand/notice in writing have been complied with. It is the obligation thereafter of the complainant to ascertain the changed address and if it is so, issue fresh notice. That being admittedly not done, the complaint does not disclose any offence and, therefore, the order issuing process is unsustainable in law.

3. On the other hand, the learned advocate for the first respondent-original complainant states that there is no error committed by either the learned Magistrate or the Revisional Court. In

the present case the notice having been issued is a fact which is not disputed. It's report is something which is a matter of evidence and the presumption that the notice sent was not received, could be rebutted by placing such material before the Trial Court as is permissible in law. On that ground, the order issuing process cannot be faulted and interfered with. More so, when there is a concurrent finding that above pleas raised can always be raised during the course of trial and substantiated therein.

4. After perusing the complaint and the application recalling issuance of process so also orders passed by learned Magistrate and Revisional Court, in my view, the process has been issued after perusal of the complaint and after the Court was satisfied that the cheque was dishonoured. The complaint after being accepted, verification statement being recorded and the Court being satisfied, issued a process summoning the accused. It is open for the accused to raise such pleas as are permissible in law to displace the presumption as above. The issue as to whether the notice was indeed not received, is something which must be gone into at the trial. By mere issuance of process it is not as if the

applicant would not have an opportunity to raise that plea and substantiate it. The conclusion at a prima facie stage cannot be said to be of such nature so as to take away the right of the applicant to rebut the presumption by leading evidence. Keeping all such pleas of both sides open and clarifying that the orders would not in any manner affect the same, this application is dismissed.

(S.C.DHARMADHIKARI, J.)